United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4022

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4022

SHAHEEN REHMAN,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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P/S

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
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Southern District of New York,
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ARGUMENT

POINT I

PETITIONER'S CERTIFICATE OF RELIEF FROM DISABILITIES DID NOT VACATE HIS CONVICTION UNDER NEW YORK STATE LAW.

A plain reading of the language of the New York State Correction Law, Section 700 et seq., is to the effect that a certificate of relief from disabilities does not vacate the underlying conviction. Rather, the statute provides only that the certificate relieves the person to whom it is issued from some of the sanctions which flow from a conviction. Thus, petitioner's certificate relieves him:

> "... of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. * * *" N.Y. Correction Law §701(1).

However, the statute clearly provides that a certificate of relief from disabilities "shall not apply, or be con-

strued so as to apply, to the right of such person to retain or be eligible for public office." N.Y. Correction Law §701(1). Moreover, and most significantly in terms of the instant case, the statute specifically provides:

> "A certificate of relief from disabilities shall not, however, in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege." (Emphasis added). N.Y. Correction Law §701(3).

Petitioner apparently contends that the issuance of the certificate goes so far as to vacate the underlying conviction. It is only reasonable to assume that had the legislature intended such an extreme consequence to result from the issuance of a certificate it would have stated so explicitly in the statute. Moreover, petitioner's contention is at odds with that language in Section 701 of the New York Corrections Law which explicitly limits the remedial effect of a certificate of relief. See DaGrossa v. Goodman, 339

N.Y.S. 2d 502, 505 (1972). Finally, the statute itself provides that the certificate shall not be deemed or construed to be a pardon nor does the issuance of such certificate in any way limit or affect the manner of applying to the governor for a pardon. N.Y. Correction Law §706.

Thus petitioner's conviction is a final conviction within the meaning of Section 241(a)(11).*

POINT II

THE PETITIONER'S CONVICTION PURSUANT TO NEW YORK PENAL LAW 220.03 RENDERS HIM DEPORTABLE UNDER SECTION 241(a)(11) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. 1251(a)(11) REGARDLESS OF HIS CERTIFICATE OF RELIEF FROM DISABILITIES.

A. Construction of the Federal Immigration Statute.

The stringent Congressional policy regarding deportation of drug offenders was recently discussed by

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*After filing this petition for review petitioner brought on a petition in coram notis to vacate his guilty plea in the New York State Court. The petition was denied in the Spring 1976.

this Court in Bronsztejn v. Immigration and Naturalization Service, 526 F.2d 1290 (2d Cir. 1975) wherein it stated:

> "Although originally directed primarily at narcotics 'trafficers', the legislative history of the INA leaves no doubt that Congress intended a stringent deportation policy regarding drug offenders. The 1952 version of the Act required deportation of addicts even though they had committed no crime and were later rehabilitated. The 1956 amendments added 'possession' as a deportable offense. Finally, in 1960 Congress specifically made the Act applicable to marijuana and its possession or distribution. We must reject any suggestion that the Act applies solely to traffickers (footnotes omitted)."

Further evidence of the attitude of Congress toward drug offenders is found in Section 241(b) of the Act, 8 U.S.C. 1251(b). Under that section an executive pardon or judicial recommendation against deportability will prevent the deportation of an alien deportable under Section 241(a)(4) of the Act, 8 U.S.C. 1251(a)(4) (alien's deportability based on conviction for crime involving moral turpitude). However, the last sentence of Section 241(b) specifically and unequivocally states

that its ameliorative provisions "shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section." Kolios v. Immigration and Naturalization Service, 532 F.2d 786 (1st Cir. 1976). See Oliver v. United States Department of Justice, Immigration and Naturalization Service, 517 F.2d 426 (2d Cir. 1975).

Neither the magnitude of the drug offense nor equities relating to the alien save him from deportation. See Van Dijk v. Immigration and Naturalization Service, 440 F.2d 798 (9th Cir. 1971); See also Guan Chow Tok and Stephen Lai v. Immigration and Naturalization Service, 2d Cir., Slip. Op. #75-4229, Docket No. 75-4251, decided July 8, 1976.

In order to support the deportation charge under Section 241(a)(11) of the Act, 8 U.S.C. §1251(a)(11), it was incumbent upon the Government to establish that Rehman was "convicted of a violation of... any law or regulation relating to the illicit possession of...

marijuana...."* In the deportation hearing the Government proved the conviction by submitting into evidence the certified record of conviction for illegal possession of hashish. Rehman admitted the conviction through counsel when pleading to the order to show cause. Rehman was, therefore, properly found deportable under Section 241 (a)(11) of the Act.

B. The Issuance of a Certificate of Relief from Disabilities to Rehman Subsequent to his Conviction Does Not Bar his Deportation Under The Immigration and Nationality Act.

Subsequent to his conviction under New York Penal Law, §220.03 for illegal possession of hashish petitioner was sentenced to a conditional discharge for a period of one year. Petitioner also was granted a temporary certificate of relief from disabilities pursuant to New York Correction Law §700 et seq. The certificate became final on March 29, 1975. Petitioner submits that the effect of the certificate was to vacate his conviction and thereby remove the grounds of his deportability.

*Under Federal and New York State Law hashish is included within the definition of marijuana. 21 U.S.C. 802(15); Public Health Law §3302.20.

But, as pointed out by the Board in its decision of November 17, 1975 New York may grant relief only from disabilities resulting from its own laws. DaGrossa v. Goodman, supra. New York's treatment of the fact of petitioner's conviction cannot effect the validity or finality of that conviction for immigration purposes.

In Garcia-Gonzalez v. Immigration and Naturalization Service, 344 F.2d 804 (9th Cir.), cert. denied, 382 U.S. 840 (1965), the Ninth Circuit faced squarely the issue whether the setting aside of a plea of guilty, entry of a plea of not guilty, and dismissal of the information pursuant to California law*, "wiped

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*The relevant statute, California Penal Code 1203.4, read:

> "Every defendant who has fulfulled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusa-

out" or "expunged" the conviction upon which the deportation order rests to the extent that the order must be reconsidered. It held that the state procedure did not have such an effect. The Ninth Circuit has consistently followed the principle laid down in Garcia-Gonzalez, supra. E.g., Chabolla-Delgado v. Immigration and Naturalization

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tions or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

"Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021." (Emphasis supplied.)

Service, 384 F.2d 360 (9th Cir. 1967), cert. denied, 393 U.S. 865 (1968); Brownrigg v. Immigration and Naturalization Service, 356 F.2d 377 (9th Cir. 1966); Kelly v. Immigration and Naturalization Service, 349 F.2d 473 (9th Cir.), cert. denied, 382 U.S. 932 (1965); Ramirez-Villa v. Immigration and Naturalization Service, 347 F.2d 985 (9th Cir.), cert. denied, 382 U.S. 908 (1965); Cruz-Martinez v. Immigration and Naturalization Service, 404 F.2d 1198 (9th Cir. 1968), cert. denied, 394 U.S. 955 (1969). In Cruz-Martinez the alien was convicted under California law for unlawful possession of heroin and marihuana. After his conviction an Order of Discharge was entered by the state court which set aside the conviction and released the alien from all penalties and disabilities resulting under state law from the conviction. In affirming the Board's decision that the alien's deportability was not affected by the Order of Discharge the court, at 1200 stated:

> Deportation is a function of federal and not of state law. In the context of a

> narcotics conviction, deportation is a punishment independent from any that may or may not be imposed by the states. While it is true that the same event, the state conviction, triggers both sets of consequences, it would be anomalous for a federal action based on a state conviction to be controlled by how the state chooses to subsequently treat the event. It is the fact of state conviction, not the manner of state punishment for that conviction, that is crucial.

The Ninth Circuit has also held that a narcotics conviction expunged under Section 176.225, Nevada Revised Statutes, which is similar to the California statute, remains a conviction for deportation purposes. Isimbidy-Rochu v. Immigration and Naturalization Service, 414 F.2d 797 (9th Cir. 1969).

The Fifth Circuit has followed the Ninth Circuit's reasoning in construing Section 7 of the Texas Adult Probation and Parole Law, which contains provisions similar to those in the California, Nevada and New York statutes. The Court, referring to the Texas statute* said:

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*Texas Code Crim. Proc. Ann. art. 42.12 §7 (1966) reads:

> "Sec. 7. At any time, after the defendant has satisfactorily completed one-third of

"Rather than a statute that completely erases the conviction, we believe the provision in controversy is accurately characterized as one that rewards a convicted party for good behavior during probation by releasing him from certain penalties and disabilities otherwise imposed upon convicted persons by Texas law. Secondly, we believe that the sanctions of 8 U.S.C. §1251(a)(11) are triggered by the fact of the state conviction. The manner in which Texas chooses to deal with a party subsequent to his conviction is

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the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the Court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted, or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense." (Emphasis supplied.)

> simply not of controlling importance insofar as a deportation proceeding - a function of federal, not state law - is concerned. We agree with the Ninth Circuit that [i]t would defeat the purposes **** [of federal law] if provisions of local law, dealing with rehabilitation of convicted persons, could remove them from their ambit of [federal penal enactments]*** We do not think Congress intended such a result." Gonzalez de Lara v. United States, 439 F.2d 1316, 1318-19 (5th Cir. 1971). (Emphasis supplied.)

Accord, Will v. Immigration and Naturalization Service, 447 F.2d 529, 531 (7th Cir. 1971); Aguilera-Enriquez v. Immigration and Naturalization Service, 516 F.2d 565, 570 (6th Cir. 1965), cert. denied, 44 U.S.L.W. 3397 (1976).

More recently, the First Circuit has agreed with the decisions of the Ninth and Fifth Circuits in Kolios v. Immigration and Naturalization Service, supra. The facts in Kolios are similar to those in the case at bar. In Kolios a twenty year old alien had been convicted under Texas law of selling marihuana. The alien was given a suspended sentence and placed on probation. After fulfilling the conditions of his probation a Texas Court

set aside his conviction and dismissed the indictment against him. This meant that his conviction was non-existent for most purposes under Texas law.

The court noted that the facts presented a sympathetic case. The alien argued that had he been convicted for a narcotics offense under federal law and dealt with under the Federal Youth Corrections Act, he would not be deported following conviction. See Mestre-Morea v. Immigration and Naturalization Service, 462 F.2d 1030 (1st Cir. 1972). The court held that the alien was deportable as having been convicted according to Section 241(a)(11). The court reasoned that Congress had taken a narrow and selective approach toward ameliorating sanctions in narcotics cases and the court could not go beyond that Congressional policy.

The only exception to this Congressional policy is the expunction of a narcotics conviction under the Federal Youth Corrections Act, 18 U.S.C. §5005 et seq., and similar state statutes for youthful offenders. This

exception is of no benefit to the petitioner, who, like the alien in Kolios, was not convicted under the Federal Youth Corrections Act or its state equivalent.

Petitioner's attempt to distinguish Cruz-Martinez, supra, and Kolios, supra, on the basis of the contemporaniety of Rehman's conviction and the issuance of his certificate ignores two facts. First, the certificate issued on the day of the alien's conviction did not become a final certificate until a full year had passed. Second, the alien's temporary certificate was revocable at any time during that year. Thus it is difficult to understand petitioner's claim that the limited relief granted him by New York from the consequences of his conviction occurred at the same time as his conviction.

Thus the certificate issued to the petitioner by the State of New York cannot alter his deportability under Section 241(a)(11) of the Act.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York

August 20, 1976.

Respectfully submitted,

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Southern District of New York,
Attorney for Respondent.

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a) Shaheen Rehman ("Rehman") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on November 17, 1975. That order dismissed an appeal from a decision of an Immigration Judge finding Rehman deportable pursuant to Section 241(a)(11) of the Act, 8 U.S.C. §1251(a)(11), by virtue of his

conviction on March 29, 1974 upon a plea of guilty, for illegal possession of hashish pursuant to New York Penal Law §220.03.

This petition for review was filed on February 4, 1976 and pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105a(a)(3), Rehman's deportation has been stayed.

STATEMENT OF THE ISSUE

Whether the issuance to Rehman of a certificate of relief from disabilities pursuant to New York Correction Law §700 et. seq. precludes a finding that Rehman is deportable as an alien convicted of a violation of a law relating to the illicit possession of marihuana under Section 241(a)(11) of the Act, 8 U.S.C. §1251(a)(11).

STATEMENT OF THE FACTS

Shaheen Rehman is a 25 year old alien, a native and citizen of Pakistan who last entered the United

States on January 17, 1974. On that date Rehman was admitted as a nonimmigrant student and was authorized to remain in the United States in that status until May 31, 1975. Subsequent to Rehman's admission by an immigration officer a routine customs search was conducted and Rehman was found to be in possession of a controlled substance, i.e., five ounces of hashish. Consequently, on January 18, 1974 Rehman was arrested by New York City police and charged with possession of a controlled substance in violation of the New York Penal Law. On March 29, 1974 Rehman was convicted upon a plea of guilty to a violation of Section 220.03 of the New York Penal Law. He was sentenced to a conditional discharge for a period of one year and fined one hundred dollars. The trial court also issued to Rehman a temporary certificate of relief from disabilities (the "certificate") which would become final on March 29, 1975.

On February 12, 1975 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings with the issuance of an order to show

cause and notice of hearing. The order to show cause charged that Rehman was deportable under Section 241(a)(11) of the Act, 8 U.S.C. §1251(a)(11), by virtue of his conviction under New York Penal Law §220.03.

At the deportation hearing on March 11, 1975 before an Immigration Judge the petitioner, who was represented by counsel, admitted his conviction. The Service introduced into evidence the record of Rehman's conviction. At the conclusion of the hearing the Immigration Judge entered a decision finding that Rehman is deportable by virtue of his conviction and that there is no form of relief from deportation available to Rehman. Accordingly, he ordered that Rehman be deported.

On March 12, 1975 Rehman appealed the decision of the Immigration Judge to the Board of Immigration Appeals. On November 17, 1975 the Board rendered a decision and entered an order dismissing the appeal. The Board concluded that Rehman had been convicted within the meaning of Section 241(a)(11) of the Act. In reaching

that conclusion the Board stated that as a result of the judgment of the trial court Rehman was barred from holding public office in New York State and that state authorities might use the conviction as the basis for the exercise of their discretion. It noted that the certificate issued to Rehman could have been revoked during the year of his conditional discharge. Lastly, the Board stated that New York could only grant relief from disabilities resulting from its own laws.

RELEVANT STATUTES

Immigration and Nationality Act of 1952, as amended:

> Section 241 (8 U.S.C. §1251) -
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who -
>
> * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession or traffic in narcotic drugs or marihuana, * * * *
>
> * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such a recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

* * *

New York Correction Law

§701 Certificate of relief from disabilities

1. A certificate of relief from disabilities may be granted as provided in this article to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. such certificate may be limited to one or

more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply to the right of such person to retain or to be eligible for public office.

* * *

3. A certificate of relief from disabilities shall not, however, in any way prevent judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 20th day of August, 1976 she served ~~a~~ two copys of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Vincent A. O'Neil
Costello, Cooney & Fearon, Esquires
600 Monroe Building
333 East Onondaga Street
Syracuse, New York 13202

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
20th day of August, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977